Public Prosecutor v Teo Kok Hing & Ors (Al Rajhi Banking & Investment Corp (M) Bhd, proposed intervener)

HIGH COURT (KUALA LUMPUR) — CRIMINAL APPLICATION NO 44–146–08 OF 2012
AMELIA TEE ABDULLAH J
4 MARCH 2014

Criminal Law — Forfeiture — Forfeiture of monies — Forfeiture of monies under ss 56 and 61 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 — Application for leave to intervene and set aside forfeiture order — Proposed intervener absent during making of forfeiture order — Whether court functus officio upon making the forfeiture order — Whether court may review own decision — Whether intervener application tantamount to asking court to reopen case

The proposed intervener, Al Rajhi Banking & Investment Corp (M) Bhd, applied for leave to intervene and to set aside the decision of the High Court made on 25 July 2012 in Miscellaneous Criminal Application No 44–31–01 of 2012 which had allowed the public prosecutor's application to forfeit a sum of RM310,000 standing in the current account of Romeo Marketing Sdn Bhd under ss 56 and 61 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001. Neither the respondents nor any third parties had attended court to make any claim to the subject property. The proposed intervener claimed to have had no knowledge of the application for forfeiture by the public prosecutor.

Held, dismissing the proposed intervener's application:

(1) The proposed intervener was late in arriving to court on the day of the hearing of the application for forfeiture. The proposed intervener was absent at the time the case was called, heard and subsequently disposed of with the making of an order of forfeiture. It was only after the court had disposed of the case and risen for the day that a representative from the proposed intervener had arrived at the court. In the circumstances, the submissions of the proposed intervener insofar as they sought to show that the court had unfairly deprived the proposed intervener of an opportunity to show cause why the property should not be forfeited was both mischievous and made mala fide (see paras 15–16).

(2) Upon making the order of forfeiture on 27 November 2012, the court was functus officio. It would not be open for the court to review its own decision. As such, the proposed intervener's application would be tantamount to asking the court to reopen a case which had been decided

upon and disposed of on 25 July 2012. Any dissatisfaction with the decision of the court in that case should be appealed to the Court of Appeal and not by way of another miscellaneous criminal application seeking leave to intervene (see paras 17–18).

[Bahasa Malaysia summary

Pencelah yang dicadangkan, Al Rajhi Banking & Investment Corp (M) Bhd, memohon untuk izin mencelah dan mengetepikan keputusan Mahkamah Tinggi yang dibuat pada 25 Julai 2012 dalam Permohonan Jenayah Pelbagai No 44–31–01 Tahun 2012 yang mana membenarkan permohonan pendakwa raya untuk merampas sejumlah RM310,000 yang terdapat dalam akaun semasa Romeo Marketing Sdn Bhd di bawah ss 56 dan 61 Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001. Responden atau pun pihak ketiga tidak hadir di mahkamah untuk untuk membuat apa-apa tuntutan kepada hartanah tersebut. Pencelah yang dicadangkan mendakwa tidak mempunyai pengetahuan mengenai permohonan untuk perampasan oleh pendakwa raya.

Diputuskan, menolak permohonan pencelah yang dicadangkan:

(1) Pencelah yang dicadangkan lewat hadir ke mahkamah pada hari pendengaran permohonan untuk perampasan tersebut. Pencelah yang dicadangkan tidak hadir pada masa kes dimasukkan, didengar dan kemudiannya diputuskan dengan membuat perintah perampasan. Hanya selepas mahkamah mendengar kes tersebut dan berbangkit pada hari tersebut, wakil daripada pencelah yang dicadangkan hadir di mahkamah. Dalam keadaan ini, penghujahan pencelah yang dicadangkan takat permohonan mereka untuk menunjukkan bahawa mahkamah telah secara tidak adil menafikan pencelah yang dicadangkan peluang untuk menunjukkan sebab mengapa hartanah tidak patut dirampas kedua-dua adalah rancangan jahat dan dibuat mala fide (lihat perenggan 15–16).

(2) Selepas membuat perintah perampasan pada 27 November 2012, mahkamah adalah functus officio. Ia tidak terbuka kepada mahkamah untuk menyemak semula keputusannya. Dengan itu, permohonan pencelah yang dicadangkan akan seperti meminta mahkamah untuk membuka semula kes yang telah diputuskan dan didengar pada 25 Julai 2012. Apa-apa ketidakpuasan dengan keputusan mahkamah dalam kes tersebut patut merayu kepada Mahkamah Rayuan dan bukan melalui permohonan jenayah pelbagai untuk memohon izin untuk mencelah (lihat perenggan 17–18).]

Cases referred to

Soong Chee Kong v PP Ng Soon Sum and anor v PP [1951] 1 MLJ 5 (refd)
Tang Kheng Teong & Anor v PP [1992] 2 MLJ 489; [1992] 3 CLJ (Rep) 672, HC (refd)

Legislation referred to

Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ss 56, 61, 61(2)
Courts of Judicature Act 1964 s 3
Criminal Procedure Code s 278

Abdullah Az-Zubayr (Zulpadli & Edham) for the applicant.
Thangavelu a/l Suppiah (Deputy Public Prosecutor, Attorney General's Chambers) for the respondents.

Amelia Tee Abdullah J:

[1] Vide a notice of application dated 29 August 2012, the proposed intervener, Al Rajhi Banking & Investment Corp (M) Bhd, had, inter alia, sought leave to intervene as an interested third party, leave to set aside the decision of the High Court made on 25 July 2012 in Miscellaneous Criminal Application No 44–31–01 of 2012 which had allowed the public prosecutor's application to forfeit a sum of RM310,000 standing in the current account of Romeo Marketing Sdn Bhd, and leave for the proposed intervener to be heard.

[2] On 27 November 2012, after hearing submissions from both parties, the court had dismissed the application of the proposed intervener. Being dissatisfied with the said order dismissing its application, the proposed intervener has now lodged an appeal to the Court of Appeal against the court's decision made on 27 November 2012.

BACKGROUND — MISCELLANEOUS CRIMINAL APPLICATION NO 44–31–01 OF 2012

[3] Miscellaneous Criminal Application No 44–31–01 of 2012 has specific relevance and connection with the present application by the proposed intervener, Al Rajhi Banking & Investment Corp (M) Bhd. In that case, the application was made by the public prosecutor under ss 56 and 61 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ('AMLATFA') for the forfeiture to the Government of Malaysia of a sum of RM310,000 standing in the account of Romeo Marketing Sdn Bhd, the third respondent in that case.

[4] In accordance with the provisions of s 61(2) of the AMLATFA, the

court had caused to be published a notice in the *gazette* calling upon any third party who claims to have any interest in the property to attend before the court to show cause why the property shall not be forfeited. The place, time and date as specified in the *gazette* was 'the High Court 3, Kuala Lumpur on 14 June 2012 at 8.30 a.m'. The notice was duly *gazetted* vide PU (B) 183 on 16 May 2012.

[5] Court records reveal that on 14 June 2012, neither the respondents on whom the notice of application was served, nor any third parties, had attended at the court to make any claim to the subject property. And on 25 July 2012, the court had allowed the public prosecutor's application to forfeit the sum of RM310,000 seized on 22 February 2011 and any increase to that amount standing in current account No 12900–1080652488 belonging to the third respondent, Romeo Marketing Sdn Bhd, at Al-Rajhi Bank, Kota Damansara branch.

THE PRESENT APPLICATION — MISCELLANEOUS CRIMINAL APPLICATION NO 44–146–08 OF 2012

[6] Al-Rajhi Banking & Investment Corp (M) Bhd, which has described itself as the proposed intervener ('Pencelah yang di Cadangkan') had filed a notice of application dated 29 August 2012 seeking an order, inter alia, for:

(a) leave for the proposed intervener to intervene in *this* proceedings ('dalam permohonan ini');

(b) leave for the proposed intervener to set aside the decision of YA Amelia Tee Hong Geok bt Abdullah on 25 July 2012 in Miscellaneous Criminal Application No 44–31–01 of 2012 which allowed the public prosecutor's application to forfeit the sum of RM310,000 in the current account of Romeo Marketing Sdn Bhd; and

(c) that the proposed intervener, as a bona fide third party, be given leave to be heard in accordance with s 61(2) of the AMLATFA.

[7] The court notes that there are various irregularities in the application which was filed by the proposed intervener. Notwithstanding that the applicant in this case is actually the proposed intervener, nevertheless they have described the public prosecutor as the applicant in the notice of application. The respondents are described as Teo Kok Hing, Kong Choy Ying and Romeo Marketing Sdn Bhd. The court notes that the description of the public prosecutor as the 'Pemohon' or applicant causes no small amount of confusion when it is further stated that it is the:

> Pemohon/Pihak Ketiga yang mempunyai kepentingan iaitu Al-Rajhi Banking & Investment Corporation (Malaysia) Bhd, akan memohon kepada Mahkamah yang Mulia ini bagi suatu Perintah ....

[8] On 27 November 2012 the court after hearing the submissions of the learned deputy public prosecutor, Thangavelu Suppiah, and Encik Abdullah Az-Zubayr from Messrs Zulpadli & Edham for the proposed intervener, had dismissed the said application.

SUBMISSIONS OF THE DEPUTY PUBLIC PROSECUTOR

[9] Whilst the learned deputy public prosecutor had, in his written submissions, touched on a number of issues, however the germane issue relevant to the court's decision relates to the issue of whether the court is functus officio when it made the order of forfeiture in Miscellaneous Criminal Application No 44–31–01 of 2012.

[10] Section 3 of the Courts of Judicature Act 1964 defines 'decision' as:

> 'decision' means any judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.

The order of forfeiture made on 27 November 2012 by the court would therefore fall within the meaning of 'decision' in s 3 as it is not a ruling but is an order which finally disposes of the rights of the parties in relation to the subject property which was ordered to be forfeited to the Government of Malaysia.

THE PROPOSED INTERVENER'S SUBMISSIONS

[11] The crux of the argument of the proposed intervener is that all forfeitures of property exercised by courts are essentially civil forfeitures regardless of whether it is a civil court or a criminal court which is exercising the function. For this proposition, learned counsel for the proposed intervener has cited the cases of *Tang Kheng Teong & Anor v Public Prosecutor* [1992] 2 MLJ 489; [1992] 3 CLJ (Rep) 672 and *Soong Chee Kong v Public Prosecutor Ng Soon Sum and anor v Public Prosecutor* [1951] 1 MLJ 5.

[12] Learned counsel for the proposed intervener has submitted that the applicant proposed intervener had, at all material times, denied knowledge of the application for forfeiture by the public prosecutor. Paragraphs 12 of their written submissions reads as follows:

> 12. Be that as it may, the applicant was present on the day the forfeiture order was made however was denied the right to show cause as to why the property should not be forfeited.

[13] The proposed intervener thus submitted that it is an interested party and had a legitimate claim towards the property and could resort to civil procedure to avail itself of its right. It was further submitted that the order

made on 25 July 2012 was not a final judgment within s 278 of the Criminal Procedure Code but that it was merely an ancillary order made on the presumption that it may be rebutted if the person who absconds is arrested, charged and tried.

FINDINGS AND DECISION

[14] From the outset, the court notes that the written submissions tendered by counsel for the proposed intervener contains certain statements which were not only inaccurate but which can be said to be wrong, misleading and mischievous. The court notes that para 12 of the said written submissions was designed to show that notwithstanding the fact that the applicant was present on the day of the hearing of the application, he was denied the right to show cause as to why the property should not be forfeited. The above could not be further from the truth.

[15] The court notes that Tunku Saiful Adli bin Tunku Nizam had, at para (f) of his affidavit in support (encl 3), affirmed that the proposed intervener was late in arriving to court on the day of the hearing of the application. The court finds it as a fact that the proposed intervener was absent at the time the case was called, heard and subsequently disposed off with the making of an order of forfeiture. It was only after the court had disposed of the case and risen for the day that a representative from the proposed intervener had arrived at the court.

[16] In the circumstances, the court is of the view that the submissions of the proposed intervener insofar as they sought to show that the court had unfairly deprived the proposed intervener of an opportunity to show cause why the property should not be forfeited was both mischievous and made mala fide.

[17] The court is of the considered view that upon making the order of forfeiture on 27 November 2012, it would then be *functus officio*. It would not be open for the court to review its own decision. As such, the court finds that the application filed by the proposed intervener in this case which sought, inter alia, for leave for the proposed intervener to intervene, leave to set aside the decision of the judge who heard and disposed of the 44–31–01 of 2012 application, and leave for the proposed intervener to be heard in accordance with s 61(2) of the AMLATFA, would be tantamount to asking the court to reopen a case which had been decided upon and disposed off on 25 July 2012.

[18] The court is of the considered view that the application made by the proposed intervener is in the nature of an attempt to reopen a case (Miscellaneous Criminal Application No 44–31–01 of 2012) which had been disposed off and closed. Any dissatisfaction with the decision of the court in

that case should be appealed to the Court of Appeal and not by way of another Miscellaneous Criminal Application (44–146–08 of 2012) seeking leave to intervene and leave to set aside the order of the judge in the earlier case.

[19] It is noteworthy that in respect of the earlier case (Miscellaneous Criminal Application No 44–31–01 of 2012), the proposed intervener, Al-Rajhi Banking & Investment Corp Sdn Bhd, had applied to the Court of Appeal for leave to file an appeal against the High Court's decision made on 25 July 2012 out of time. However, the application was dismissed by the Court of Appeal on 24 September 2012.

CONCLUSION

[20] In light of the fact that the decision of the court made on 25 July 2012 is a final decision which disposes of the rights of the parties, which decision is only appealable to the Court of Appeal, and in light of the fact that the Court of Appeal had dismissed the proposed intervener's application for leave to file its notice of appeal out of time, the court is of the considered view that the present application for leave to intervene and to set aside the decision of the court made on 25 July 2012 is but another attempt to appeal against the said decision.

[21] Accordingly and for the reasons afore stated, the court had dismissed the application of the proposed intervener in this case.

Proposed intervener's application dismissed.

Reported by Kanesh Sundrum